

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Signed

UNITED STATES OF AMERICA and
DENNIS J. HERZOG, Special Agent,
Internal Revenue Service,

B

Petitioners-Appellees

v.

ASPHALT MATERIALS, INCORPORATED
CHARLES HALL, President,

P/S

Respondents-Appellants

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

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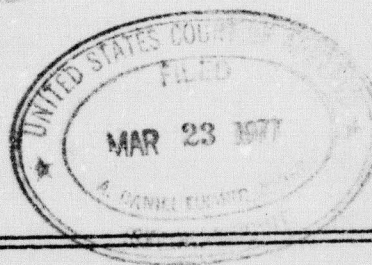




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ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT
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BRIEF FOR THE APPELLEES

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court correctly ordered enforcement
of an Internal Revenue Service summons to compel production of
corporate records.

STATEMENT OF THE CASE

This case involves the enforcement of an Internal Revenue Service summons issued to Charles Hall, as president of Asphalt Materials, Incorporated, demanding production of certain corporate records. On November 19, 1976, the District Court ordered enforcement of the summons (R. 29-32), ^{1/} and notice of appeal was timely filed on December 20, 1976 (R. 33). This Court's jurisdiction is based on 28 U.S.C., Section 1291.

The facts may be summarized as follows:

Dennis J. Herzog, a special agent with the Internal Revenue Service, was assigned to conduct an examination of the tax liabilities of Charles Hall for taxable years 1972 through 1974. Hall is the president and majority stockholder of Asphalt. (R. 9.) On April 8, 1976, Herzog served a summons on Hall, as president of Asphalt. This summons, which is the subject of this litigation, requested production of (R. 7):

1. Records of all corporate sales whether denominated "sales journals" or by any other name;
2. Records of all corporate cash receipts whether denominated "cash receipts journals" or by any other name;
3. Records of corporate disbursements whether denominated "cash disbursements journals" or by any other name;
4. All bank statements and cancelled checks in the name Asphalt Materials Corp., Inc., or any variation of the corporate name, which reflect transactions of checking account with Manufacturers & Traders Trust Co. for the calendar years 1967 through 1974 and any and all other corporate checking accounts;

1/ "R." references are to the separately bound record appendix.

5. Profit and loss statements whether denominated as such or by any other name;
6. Balance sheets whether denominated as such or by any other name;
7. Retained copies of all Forms 1120 filed by Asphalt Materials Corp., Inc., whether filed in such name or any variation thereof;
8. Retained copies of all Forms 940 and 941 filed by Asphalt Materials Corp., Inc., whether filed in such name or any variation thereof;
9. Records requested in Items 1 through 8 above for periods 1967 through 1974.

Hall failed to comply with the summons (R. 10) and the Government brought this enforcement action (R. 3-6). The petition and supporting affidavit recited the essential facts stated above and alleged that there had been "no recommendation for prosecution of the taxpayer * * * to the * * * Department of Justice" (R. 5, 10); that it was "essential to the determination of * * * [Hall's] tax liabilities" that the records be produced (R. 5); that the records "relate to the tax liabilities under investigation" (R. 9); and, that the records "are necessary for * * * [a] determination of * * * [Hall's tax liabilities]" (R. 10). The District Court issued a show cause order requiring a written response. (R. 1-2.)

Hall responded through an "Answering Affidavit" of the counsel. This response alleged, inter alia, that the petition and affidavit failed to disclose "a single allegation that the documents or testimony sought is relevant or material to" the agent's purpose (R. 12) and, therefore, the petition to enforce should be denied because the statute (Sec. 7602 of the Internal

Revenue Code of 1954 (26 U.S.C.)) requires a "demonstration of solid proof that what is sought is relevant and material" (ibid.). The response also contained allegations that the petition should be denied on the grounds that it failed "to comply with the IRS standards and constitutes a violation of respondents [sic] 4th and 5th amendment Constitutional rights." (R. 14.)

After argument by counsel, the District Court found that the records sought "are highly relevant to the presently-contemplated civil investigation and are sufficiently delineated and circumscribed to satisfy the standards of Section 7602." (R. 30.) The court also rejected Hall's contention, which was not raised in the written response to the petition, that the enforcement should be denied because the investigation might eventually result in criminal prosecution. The court found that "no recommendation for criminal prosecution has been made, no harrassment has been alleged, and the IRS has not yet inspected the books and records to be produced. No evidence has been produced to show that the investigating agent has" "already formed a firm purpose to recommend prosecution.'" (R. 31.)

Based upon these findings and conclusions, the court ordered the summons enforced and taxpayer brings this appeal from that order.

ARGUMENT

THE DISTRICT COURT CORRECTLY ORDERED
ENFORCEMENT OF THE SUMMONS TO COMPEL
PRODUCTION OF CORPORATE RECORDS

A. Introduction and Summary of Argument

Section 7602 of the Internal Revenue Code of 1954, Appendix, infra, grants the Secretary of the Treasury and his delegates broad powers to issue summonses for the production of books and records for the testimony of any individual concerning any tax liability. See, e.g., United States v. Bisceglia, 420 U.S. 141, 145-146 (1975). Sections 7402(b) and 7604 (26 U.S.C.) grant authority to the district courts of the United States to issue orders compelling compliance with these summonses. Questions have frequently arisen concerning the proper procedure to be used in such judicial actions. Generally, it has been accepted that enforcement proceedings are initiated by filing a petition, supported by an affidavit of the issuing agent, seeking an order directing the summoned party to show cause why he should not comply with the summons. In its petition, the Government makes an initial showing that the summons was issued for a proper purpose, that the material is relevant to that purpose, that the information is not already in the Treasury's possession and that the Internal Revenue Service has complied with administrative steps required by the Internal Revenue Code. See United States v. Powell, 379 U.S. 48, 57-58 (1964). The court then issues a show cause order, requiring a written response raising all defenses, and setting a date for a hearing before the court.

See United States v. Davey, 426 F. 2d 842 (C.A. 2, 1970); United States v. Harrington, 388 F. 2d 520 (C.A. 2, 1968); United States v. McCarthy, 514 F. 2d 368, 372-373 (C.A. 3, 1975); United States v. Turner, 480 F. 2d 272, 274 (C.A. 7, 1973); United States v. Newman, 441 F. 2d 165, 169-170 (C.A. 5, 1971). At this point, the issue is joined and the District Court determines whether an evidentiary hearing is necessary. In this determination, any facts alleged in the petition which are not specifically denied in the answer, supported by affidavit, are admitted. United States v. McCarthy, supra; United States v. Newman, supra.

In this case Hall makes essentially two arguments: first, the moving papers were insufficient to establish that the documents sought were relevant to the tax investigation; and, secondly, that he was wrongfully denied an evidentiary hearing to develop that the summons was motivated by prosecutorial intent. These contentions are without merit.

Regarding Hall's contention that the moving papers failed to allege sufficient ground for the court to determine the relevancy of the documents to the investigation, he seems to contend that the Government must establish an absolute nexus between the documents and the investigation--in effect that the Government must show probable cause to believe that the documents will be relevant to the investigation. This is contrary to the well-established rule that the Government need only establish that the documents might be relevant to the investigation.

Foster v. United States, 265 F. 2d 183 (C.A. 2, 1959), cert. denied, 360 U.S. 912 (1959); United States v. Shlom, 420 F. 2d 263 (C.A. 2, 1969), cert. denied, 397 U.S. 1074 (1970). Here, the records sought unquestionably reflect on Hall's tax liabilities.

Secondly, as to the Hall's contention that a hearing should have been conducted to determine whether the issuance of the summons was motivated by prosecutorial intent, we point out that the issue was not raised in Hall's written response, nor was there an oral request for an evidentiary hearing. Even though the District Court addressed the underlying legal issue, under these circumstances the argument should not be considered here. More importantly, however, the argument is based on an erroneous legal analysis. The argument seems to be predicated on the unenunciated assumptions that the Internal Revenue Service does not have the authority to investigate suspected criminal violations and that the Internal Revenue Service has the authority to prosecute. Both assumptions are totally without merit and the argument must be rejected. Clearly, since the argument is based on erroneous conclusions of law, the District Court committed no error by not granting an evidentiary hearing.

We turn now to a more detailed discussion of these points.

B. The District Court correctly concluded that the petition and affidavit contained an ample showing of the relevancy of the records sought to order enforcement of the summons

Section 7602 of the Internal Revenue Code of 1954, Appendix, infra, provides, inter alia, that the Secretary or his delegate is authorized "To summon * * * any person having possession * * * of * * * [records] relating to the business of the person liable for tax * * * or any other person the Secretary or his delegate may deem proper * * * to produce such * * * [records], as may be relevant or material to" any inquiry into the correctness of any return. The essence of Hall's argument is that the Government failed to establish by its petition and accompanying affidavit that the corporate records sought may be relevant to the agent's investigation of Hall's tax liabilities. The test of whether a record sought to be produced is relevant or material within the meaning of Section 7602 is whether the inspection sought might throw light upon the correctness of the taxpayer's returns. Foster v. United States, supra, p. 187; United States v. Shlom, supra, p. 265.

The summons here sought records of a corporation of which Hall was the president and majority stockholder. It is naive to assume that such records would not throw light upon Hall's tax liabilities. He was employed by the corporation. It is also reasonable to assume that he received distributions from the corporation by virtue of his stock ownership. Clearly both of these factors could have a substantial bearing on Hall's tax

liabilities. See Sec. 61 of the Internal Revenue Code (26 U.S.C.). Moreover, only after a thoughtful analysis of the basic corporate records would it be possible to arrive at meaningful analysis of the correct tax treatment of any receipts from the corporation. Thus, as the District Court correctly stated, "An examination of the summons reveals that the items to be produced are highly relevant to the presently-contemplated civil investigation." (R. 30.)

Hall seems to accept this (Br. 6) but challenges the Government's showing of relevancy because the Government failed to show "the purpose and extent of this * * * [particular] investigation." This appears to be little more than contending that the Government must show "probable cause" for its investigation. In the final analysis, Hall's argument appears to be that the Government must reveal the details of its investigation to establish an absolute nexus, or at least "probable" nexus, between a potential liability and each document requested. This rationale, however, is contrary to the well-established rule that the Internal Revenue Service can investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." United States v. Bisceglia, *supra*, pp. 145-146. See also United States v. Powell, 379 U.S. 48, 57 (1964). Surely, in light of Powell and Bisceglia, Hall does not contend that the summons authority is more restrictive than its investigative authority.

Hall seems also to suggest that enforcement was improper because the agent failed to follow internal guidelines of the Internal Revenue Service with respect to his affidavit. (Br. 6.) Here, the affidavit recites that (1) the agent is conducting an investigation of Hall (R. 9); (2) the records sought "relate to the tax liabilities under investigation" (R. 9); (3) the records are not in the possession of the Internal Revenue Service (R. 10); and (4) the records "are necessary for the determination of the tax liabilities" of Hall (R. 10). These allegations fully comply with the showing required by United States v. Powell, supra, and, indeed, appear virtually identical to the recitation in United States v. Harrington, supra. See also United States v. Newman, supra, p. 169. Thus, regardless of the internal guidelines, the District Court properly concluded that the Government's showing was sufficient.

Furthermore, Hall's contention that the guidelines were not complied with is without merit. The guidelines (Handbook for Special Agents, Intelligence Division, Internal Revenue Manual, 9900, § 268.3(1), Appendix, infra) state that the United States Attorney may request an "affidavit (Exhibit 200-16 contains a sample) reciting detailed information concerning the nature and purpose of the examination, the testimony and records desired, and their relevancy to the examination * * * [It] is highly important that the affidavits clearly show that * * * [the records] are material and relevant to the tax liability." As discussed above, the affidavit and the summons which was attached

to the affidavit fully comply with the guidelines and, indeed, the affidavit is more detailed than the exhibit in the handbook. Compare Exhibit 200-16 referred to in the guidelines, Appendix, infra.

In sum, the showing by the Government fully complies with the procedures enunciated in Powell and set forth by the Internal Revenue Service. In the end, Hall's dissatisfaction is apparently based, not on the contents of the moving papers, but on a desire to gain detailed information concerning the specifics of the agent's investigation. Such dissatisfaction, however, hardly provides a basis for a judicial refusal to enforce the summons.

C. The District Court correctly refused to conduct a hearing to determine whether the summons was issued for an improper purpose

Hall contends that the District Court incorrectly ordered enforcement of the summons without an evidentiary hearing to determine if the issuance of the summons was motivated by prosecutorial intent. The initial problem with this argument is that Hall did not raise the question of the agent's motivation in his answer nor did he make any request, written or oral, for a hearing. Under these circumstances, and notwithstanding the fact that the District Court addressed the underlying merits of the argument, we respectfully submit that Hall's failure to raise the argument in his answer and failure to request an evidentiary hearing in the District Court preclude him from raising the argument here. See United States v. McCarthy, supra; Rule 12(b) Federal Rules of Civil Procedure.

Putting aside these shortcomings, the District Court, assuming a request for a hearing was made, correctly refused to conduct an evidentiary hearing. As discussed, supra, p. 6, an evidentiary hearing is improper if, upon examination of the defense, the District Court determines that it is without legal merit. Here, the essence of Hall's position is bottomed on the contention that the Internal Revenue Service cannot use its summons authority to investigate criminal tax offenses. This contention is based upon an erroneous interpretation of the statute, its legislative history and the leading cases.

1. Introduction: The statutes and pre-Donaldson decisions

Section 7602 of the Internal Revenue Code of 1954, Appendix, infra, authorizes the Secretary of the Treasury or his delegate to examine records, issue summonses and take testimony for purposes broadly co-extensive with his duty to administer and enforce the internal revenue laws under Section 7801 (26 U.S.C.). On its face, Section 7602 contains no restrictions on the power to issue a summons, if the summons is issued for the purpose, inter alia, of ascertaining the correctness of any tax return. The courts, when called upon to enforce such a summons, have allowed the party resisting the summons to advance various defenses, embraced, generally speaking, within the familiar concept of abuse of process. In United States v. Powell, supra, p. 58, the Court outlined this rationale as follows:

It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the court's process is on the taxpayer, and it is not met by a mere showing, as was made in this case, that the statute of limitations for ordinary deficiencies has run or that the records in question have already been once examined.

The "abuse of process" concept has continued to be employed by the Supreme Court as a general guide to the nature of objections which constitute defenses to enforcement of an Internal Revenue summons. Donaldson v. United States, 400 U.S. 517 (1971). See also United States v. Newman, supra, p. 169, fn. 17. It is central to the concept of "abuse of process" that the one using legal process is attempting to accomplish a purpose for which the process is not designed.

Prior to Donaldson v. United States, supra, as instances of such an abuse of process, the Supreme Court had, by way of dicta, suggested the case of a summons issued "for the improper purpose of obtaining evidence for use in a criminal prosecution" (Reisman v. Caplin, 375 U.S. 440, 449 (1964)), or where a "summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation" (United States v. Powell, supra, p. 58).

Litigation concerning the "good faith" criterion enunciated in Powell has often been considered in the same breath as the "criminal purpose" criterion of Reisman by those resisting the summons and, indeed, by some courts. See United States v. Zack, 521 F. 2d 1366 (C.A. 9, 1975). Compare United States v. Weingarden, 473 F. 2d 454 (C.A. 6, 1973) with United States v. Cleveland Trust Co., 474 F. 2d 1234 (C.A. 6, 1973), cert. denied sub nom. Miceli v. United States, 414 U.S. 866 (1973). See also United States v. Wright Motor Co., 536 F. 2d 1090 (C.A. 5, 1976); United States v. White, 477 F. 2d 757, 764-765 (C.A. 5, 1973) (Judge Ainsworth, dissenting), aff'd en banc, 487 F. 2d 1335 (C.A. 5, 1973), cert. denied, 419 U.S. 872 (1974). In analyzing the statements of Powell and Reisman, it must be recalled, however, that the Court was concerned with two entirely different types of abuse of process.

(a) Reisman and "criminal purpose"

In Reisman (p. 442), taxpayers' attorneys sought to enjoin an accounting firm from complying with a summons, contending that "the enforced production of the papers is an unlawful appropriation of petitioners' work product and trial preparation as well as an unreasonable seizure requiring the Bromleys [taxpayers] to incriminate themselves and depriving them of the effective assistance of counsel." At the time the summons was issued, taxpayers had been advised that a criminal investigation was pending. Reisman v. Caplin, supra, p. 443.) The Court, however, did not discuss this problem in terms of "good faith."

The Reisman dictum, concerning criminal purpose, cited Boren v. Tucker, 239 F. 2d 767, 772-773 (C.A. 9, 1957), in which it had been held, after full discussion, that an Internal Revenue summons was properly used, and should be enforced, where the special agent was admittedly engaged in an investigation to determine whether criminal prosecution should be initiated. The person resisting the summons in Boren had urged the courts to apply a rule based on an extension of United States v. O'Connor, 118 F. Supp. 248 (Mass., 1953). In O'Connor, the Internal Revenue Service summons had been issued after an indictment had been returned against the taxpayer. The special agent who issued the summons in O'Connor no longer was engaged in an investigation for the benefit of the Internal Revenue Service but was acting in aid of the United States Attorney, assisting the latter in preparing for the trial of the existing criminal indictment. There was, therefore, substance to the District Court's view that the criminal proceedings were under the aegis of the judicial branch, and that to discharge his administrative responsibilities to be used on behalf of the prosecutor would contravene a fundamental tenet of our procedural philosophy, which, in general, denies to the prosecution the use of compulsory process for pretrial preparation, except as provided in the Federal Rules of Criminal Procedure. Compare Campbell v. Eastland, 307 F. 2d 478 (C.A. 5, 1962).

In Boren v. Tucker, supra, accordingly, the court held that the O'Connor rule was limited to the facts of the case, to wit: (a) the taxpayer was under indictment; (b) the special agent had completed and submitted his report, and no further matters concerning the taxpayer were before him; and (c) the prosecuting agency had "suggested" the issuance of the summons and the special agent was not acting in discharge of his duty to advise and inform the Secretary of the Treasury (or his delegated subordinates). The court emphasized that simultaneous consideration by the Internal Revenue Service of both civil and criminal penalties cannot easily be disentangled during the investigative stage of the proceeding. The Reisman dictum would thus appear to be intelligible only in full light of the actual decision and when viewed within the reasoning in Boren v. Tucker. See Donaldson v. United States, supra, p. 533.

Subsequent to Reisman, and based almost entirely on the Reisman dictum, a concerted effort was made on behalf of persons to resist enforcement of Internal Revenue summonses on the ground that the investigation might result in a criminal prosecution. Generally, this contention employed the rationale that the presence of a special agent in an investigation establishes, without more, that the purpose of the summons was improper. However, from Reisman v. Caplin, supra, to Donaldson v. United States, supra, the appellate courts have uniformly rejected this contention. See, e.g. McGarry v. Riley, 363 F. 2d 421, 424 (C.A. 1, 1966), cert. denied, 315 U.S. 969 (1966); In re Magnus, Mabee &

Reynard, Inc., 311 F. 2d 12, 15-16 (C.A. 2, 1962), cert denied, 373 U.S. 902 (1963); United States v. DeGrosa, 405 F. 2d 926, 928 (C.A. 3, 1969), cert. denied sub nom. Zudick v. United States, 394 U.S. 973 (1969); Venn v. United States, 400 F. 2d 207, 210 (C.A. 5, 1968); United States v. Artman, 435 F. 2d 1375 (C.A. 6, 1970); United States v. Hayes, 408 F. 2d 932, 936 (C.A. 7, 1969), cert. denied, 396 U.S. 835 (1969); Daly v. United States, 393 F. 2d 873, 874 (C.A. 8, 1968); Howfield, Inc. v. United States, 409 F. 2d 694, 697 (C.A. 9, 1969).

The result of the pre-Donaldson litigation, thus, established a general rule which sanctioned the use of Internal Revenue summonses in connection with investigations into criminal liability under the tax laws. See United States v. Michigan Bell Telephone Co., 415 F. 2d 1284 (C.A. 6, 1969); United States v. DeGrosa, supra; Venn v. United States, supra.

(b) Powell and "good faith"

The Court in the Powell case, supra (p. 51), was concerned on the other hand, with the question whether the Government "need make no showing of probable cause to suspect fraud unless the taxpayer raises a substantial question * * * [of an abuse of process], predicated on more than the fact of re-examination and the running of the statute of limitations on ordinary tax liability." In such a context, the "good faith" requirement, as used in Powell, is concerned not with whether the summons is being used to obtain evidence for criminal prosecution, as was discussed in Reisman.

but whether the summons is being used as a harassing device or solely as a device to aid in an investigation totally unrelated to the enforcement of revenue statutes. Cf. United States v. Hodge & Zweig, decided February 16, 1977, (C.A. 9 - No. 75-3374); DiPiazza v. United States, 415 F. 2d 99 (C.A. 6, 1969). See also United States v. Ryan, 320 F. 2d 500, 502 (C.A. 6, 1962), aff'd, 390 U.S. 61 (1964). Thus, despite certain holdings to the contrary (see p. 14, supra), the "good faith" criterion was addressed to a consideration totally different from the "criminal purpose" objection, and, indeed, such a construction of "good faith" would seem to be improper.^{2/}

2. The Donaldson decision

In Donaldson v. United States, supra, the taxpayer sought to intervene in a summons enforcement action. Taxpayer raised two principal questions--to wit, whether the taxpayer had an interest of sufficient magnitude in the documents summoned to be allowed to intervene in the proceedings and, secondly, whether a summons could be enforced if it was issued "in aid of an investigation that has the potentiality of resulting in a recommendation that a criminal prosecution be instituted against the taxpayer." Donaldson v. United States, supra, p. 532. The summons had been served on taxpayer's former employer, requiring the employer to produce certain records belonging to the employer concerning taxpayer's financial transactions between the employer

^{2/} As the District Court pointed out (R. 31), there are no allegations of a lack of good faith within the Powell meaning of the phrase.

and taxpayer. The District Court denied taxpayer's motion to intervene and ordered the employer to produce the records. The court of appeals affirmed.

The Supreme Court affirmed the denial of taxpayer's motion to intervene. The Court (p. 531), recognizing that the affirmance of the denial could dispose of the case, nevertheless proceeded to discuss whether a summons could be issued if the investigation might lead to a criminal prosecution. Initially, the Court noted (p. 532) that the cases uniformly approved of the use of a summons in an investigation that is likely to lead to civil liability as well as criminal liability. The Court then stated (400 U.S., p. 533):

On the other hand, it has been said, usually citing Reisman, that where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution, the purpose is not a legitimate one and enforcement may be denied. This, of course, would likely be the case where a criminal prosecution has been instituted and is pending at the time of issuance of the summons.

It is precisely the latter situation-- where the sole object of the investigation is to gather data for criminal prosecution-- that is the subject of the Reisman dictum. This is evident from the fact that the dictum itself embraces the citation of Boren v. Tucker, 239 F. 2d 767, 772-773 (C A 9, 1956), an opinion in which, at the pages cited, the Ninth Circuit very carefully distinguished United States v. O'Connor, 118 F. Supp. 248 (Mass. 1953), a case where the taxpayer already

was under indictment. The Reisman dictum is to be read in the light of its citation of Boren, and of Boren's own citation of O'Connor; when so read, the dictum comes into proper focus as applicable to the situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes.

Any other holding, of course, would thwart and defeat the appropriate investigatory powers that the Congress has placed in "the Secretary or his delegate."

The Court, after briefly reviewing the organization of the Internal Revenue Service, then stated (400 U.S., p. 536):

We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution.

In this holding, ^{3/} we submit that the Court reiterated the two mutually exclusive criteria developed earlier in Reisman and Powell, and established specific standards to be applied in determining whether or not the Court's process would be in jeopardy if judicial enforcement were ordered.

^{3/} The Sixth Circuit in United States v. Weingarden, supra, p. 460, treated this statement as dictum; we submit, however, that even if dictum, this statement is highly significant. Moreover, in refusing to afford authoritative weight to the Donaldson statement, the Sixth Circuit reverted back to the dictum in Reisman v. Caplin, discussed, supra, pp. 17-20 (United States v. Weingarden, supra, p. 459) which Donaldson sought to explain.

The thrust of the recommendation language of Donaldson is directed to what we have, heretofore, discussed as the "criminal purpose" objection. In this regard, the only interpretation of the term "recommendation" not clearly inconsistent with the Court's rationale would be, in terms of when a recommendation is made, the recommendation for prosecution by the Internal Revenue Service to the Department of Justice. United States v. Billingsly, 469 F. 2d 1208 (C.A. 10, 1972); United States v. Hodge & Zweig, supra. See also United States v. Averkamp, 497 F. 2d 832, 834 (C.A. 7, 1974); United States v. Churchill, 483 F. 2d 268, 272 (C.A. 1, 1973).

The authority to prosecute is only within the Department of Justice (Department of Justice Regulations on Tax Division, §0.70 (28 C.F.R.)), and at all times before referral, when the case is within the Internal Revenue Service, it is purely an investigation of the taxpayer's potential criminal and/or civil liabilities. It is only at the conclusion of such an investigation that a reasoned recommendation can be made to the Department of Justice. Not until that time is a matured and considered "recommendation" made which reflects a judgment by the Treasury Department that it has fairly exercised and discharged its responsibility to investigate tax delinquencies. Before such a referral, it cannot be said that a criminal prosecution is pending in which there should be applied the "traditional" denial of compulsory pretrial process.

Any other interpretation of the term "recommendation" also is plainly inconsistent with the authorities upon which the Donaldson decision rests. As previously indicated, the decisions preceding Donaldson sanctioned the use of the summons up to the point where a criminal prosecution was founded upon these decisions. (See Donaldson v. United States, supra, pp. 532-535, fn. 13, 14, 15.) The leading cases, Boren v. Tucker, supra, and others cited above, clearly limited the "criminal purpose" concept to a set of facts where there was a pending indictment charging tax offenses and no other purpose was established for the issuance of the summons other than to aid the Department of Justice in its prosecution of the taxpayer. This was the factual situation presented by the O'Connor case. See also Application of Myers, 202 F. Supp. 212 (E.D. Pa., 1962). As noted by Mr. Justice Blackman (p. 532), it was precisely the O'Connor-type of case--where the Department of Justice was proceeding with the tax prosecution--that would constitute an improper purpose for issuance of a summons. It, therefore, would be contradictory for the Court to have limited the use of a summons when the investigation is still within the Internal Revenue Service, without overruling or modifying these significant decisions of the court of appeals, since their thrust was clearly to the contrary.

Moreover, while the Supreme Court in Donaldson discussed the recommendation of the special agent in the paragraph immediately preceding its "good faith" and "recommendation for criminal prosecution" criteria, the Court made it clear that it did not sanction any result which would "stultify enforcement of federal law" by forcing the Internal Revenue Service "to forgo either the use of the summons or the potentiality of an ultimate recommendation for prosecution." (Emphasis added.) Donaldson v. United States, supra, pp. 535-536. Application of a "firm purpose" limitation, however, effectuates precisely the contrary result. Underlying the Donaldson holding is the realization by the Court that no valid purpose is served by forcing the Internal Revenue Service to forego the use of its primary investigative tool until after the Internal Revenue Service has fulfilled its statutory duty to investigate both civil and criminal violations of the Code. See Sec. 7801(a) of the Internal Revenue Code of 1954 (26 U.S.C.). Thus, whether or not an agent forms the opinion that prosecution is warranted is irrelevant to the judicial enforcement of a summons. See United States v. Billingsley, supra.

Contrary to this reasoning, and based on the Reisman "criminal purpose" dictum, some courts have suggested that a summons should not be enforced if the agent has formed a "firm purpose" to recommend prosecution. See e.g., United States v. Wall Corp., 475 F. 2d 893, 895 (C.A.D.C., 1972) (dictum); United States v. McCarthy, supra, p. 374 (dictum). These suggestions seem to be

based on the totally erroneous premise that the "Internal Revenue [Service] has no authority to conduct a criminal investigation through the use of its summons." United States v. Lafko, 520 F. 2d 622, 624 (C.A. 3, 1975).^{4/} There is nothing in Section 7602 which supports this limitation. Donaldson v. United States, supra, p. 537 (Justice Douglas, concurring). To the contrary, the legislative history "appears to authorize the use of the summons for investigation into criminal conduct." Donaldson v. United States, supra, p. 535. Section 3654 of the Internal Revenue Code 1939 to which the Donaldson opinion refers, provided, inter alia:

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):
SEC. 2654. GENERAL POWERS AND DUTIES RELATING
TO COLLECTION.

(a) Collectors.--Every collector * * * shall aid in the prevention, detection, and punishment of any frauds * * *. For such purposes, he shall have the power * * * to summon any person * * * as provided in section 3615.

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*

This statute is particularly pertinent because in enacting Section 7602 of the 1954 Code, Congress intended "no material change from existing law. (H. Rep. No. 1337, 83d Cong., 2d Sess., p. A436 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4584-4585);

/ The Third Circuit in United States v. Friedman, 532 F. 2d 928, 932, fn. 9 (1976), noted that "No court has given a thorough or persuasive justification for this construction of 26 U.S.C., § 7602." The court refused to consider the issue because the construction of the statute had been accepted in Donaldson, supra. As pointed out above, the trust of Donaldson is clearly to the contrary.

therefore, any suggestion that the Internal Revenue Service is without the statutory authority to utilize its summons authority to conduct a criminal investigation simply ignores the history of the statute.

In this respect, it seems strange to suggest that the Congress would have charged the Secretary of the Treasury with "the administration and enforcement" of the revenue laws (Sec. 7801(a)) and instruct him to "inquire after and concerning all persons therein who may be liable to pay any internal revenue tax" (Sec. 7601 (26 U.S.C.)), and at the same time to curtail seriously the use of his primary investigative tool. We are unaware of any individual interest that would be furthered by limiting the Secretary's investigative authority in such a fashion. Compare United States v. Bisceglia, supra. It seems apparent that the only result is to force the Internal Revenue Service to forego its investigation in spite of its Congressional mandate to investigate. Certainly to sustain any judicially imposed restriction on this authority would require persuasive bases not found here.

In sum, if the varying phraseologies used by the Supreme Court in Powell, Reisman and Donaldson are to be reconciled with the language of the statute and its legislative history, we submit that the only reasonable interpretation of the "sole criminal" purpose language is that it is limited to cases where the case has been officially forwarded to the Department of Justice.

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Accordingly, even if the individual agent's sole purpose is to obtain evidence in a case where he believes that the taxpayer might or should be prosecuted, the issuance and enforcement of the summons is entirely proper as long as the investigation is within the Internal Revenue Service.

By introducing an essentially irrelevant consideration, persons resisting the enforcement of summonses have been provided a basis for extended litigation requiring additional factual analysis which, in our view, is quite unnecessary. With respect to this case, it is apparently uncontroverted that investigation is still within the Internal Revenue Service and the summonses were not issued at the behest of the Department of Justice. In these circumstances the issuance of the summons is well within the statutory authority of the Internal Revenue Service. It is apparent then that a hearing on the agent's individual motivation would serve no purpose other than to delay the proceeding and, in these circumstances, there can be no conceivable error in not conducting an evidentiary hearing.^{5/}

^{5/} We note also that in support of his claim that the District Court should have ordered a hearing to determine if issuance of the summons was motivated by prosecutorial intent, Hall relies upon (Br. 7) statements by the Assistant United States Attorney, who presented argument on behalf of the petitioners, that "all the records * * * are relevant obviously to a criminal investigation against Mr. Hall and/or the corporation" (R. 22) and that "These could hardly be any more relevant and material inquiry when you seek to build a criminal tax case against a president of a company" (Ibid.). Hall conveniently ignores, however, other statements of the Assistant United States Attorney which clearly indicate that the summons was not issued for a sole criminal purpose--i.e., "These are dozens of cases showing that an inquiry like this on its face is overwhelmingly relevant to any possible tax liability on behalf of the president of this

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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MARCH, 1977.

5/ (continued)

company" (R. 22-23); "there is no such admission [that the basis of the summons was not civil tax liability]" (R. 23); "I am not saying [that] it [criminal aspects] is the sole purpose" (R. 25). In specific response to a question from the court concerning his reference to criminal prosecution, the Assistant United States Attorney explained that "I was telling him there are large possibilities of investigation which are available." (R. 23.)

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief been
made on opposing counsel by mailing four copies thereof on this
21st day of March, 1977, in an envelope, with postage prepaid,
properly addressed to him as follows:

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized--

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

HANDBOOK FOR SPECIAL AGENTS,
INTELLIGENCE DIVISION,
INTERNAL REVENUE MANUAL, c. 9900:

SEC. 268.3

Use of Affidavits in Summons Proceedings

(1) To support applications for court orders directing compliance with a summons, the agent may be requested by the United States Attorney to prepare an affidavit (Exhibit 200-16 contains a sample) reciting detailed information concerning the nature and purpose of the examination, the testimony and records desired, and their relevancy to the examination. Usually, enforcement proceedings are held solely upon affidavits (of the agents and possibly the person summoned) and oral argument. Accordingly, it is highly important that the affidavits clearly show that the person summoned has possession, care, or custody of the desired records, and that they are material and relevant to the tax liability of the person being investigated. If the summons pertains to a year previously examined, a copy of the Commissioner's reopening letter should be attached.

(2) If there is a sharp dispute on the basic question of whether the records are subject to the control of the person served with the summons, the court will usually not resolve the matter on the basis of conflicting affidavits, but will have the issue of control and wilfulness in failing to comply with the order determined in a contempt proceeding.

HANDBOOK FOR SPECIAL AGENTS

EXHIBIT 200-16

Handbook Reference: Subsection 268.3

AFFIDAVIT

UNITED STATES OF AMERICA)
) SS
SOUTHERN DISTRICT OF TEXAS)

I, Norman A. Stone, Special Agent, being first duly sworn, depose and say: I executed an Internal Revenue Summons (Form 2039) and served it on Mr. J. C. Harrison, President of Harrison Sales Co., Inc., 718 Rand St., Houston, Texas 77015, on July 18, 1968, at 11:30 A.M. I handed the Attested Copy of the summons (Form 2039A) to Mr. J. C. Harrison in accordance with Section 7603, Internal Revenue Code. This summons required Mr. J. C. Harrison to appear before me and to produce certain corporate records on July 29, 1968, at 10:00 A.M., at the office of the Intelligence Division, 210 Federal Building, Houston, Texas.

Mr. J. C. Harrison failed to comply with this summons. He did not appear at the scheduled time and place, and has since failed to appear or produce the corporate records designated in the summons.

Norman A. Stone
Special Agent

SUBSCRIBED AND SWORN TO BEFORE ME THIS 29th DAY OF JULY, 1968.

Notary Public

MT 9900-16 (11-15-69) IR Manual

(REPRINT) IR MANUAL, MT 9900-16 (11-15-72)